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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT SHELL OIL COMPANY

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a charge filed by a Commissioner of the Equal Employment Opportunity Commission satisfies the "oath" and "notice" requirements regarding the "date" and "circumstances" elements of Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, in the absence of either a good faith estimate of the probable time periods of the alleged violations or any specific factual averments.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE COMMISSIONER'S CHARGE HEREIN WAS INVALID BECAUSE IT CONTAINED NEITHER A GOOD FAITH ESTIMATE OF THE PROBABLE DATE NOR SUFFICIENT FACTUAL INFORMATION TO MEET THE OATH AND NOTICE REQUIREMENTS OF TITLE VII	8
A. Congress Intended The Requirements For The Issuance Of A Commissioner's Charge To Serve As A Meaningful Constraint Upon The Commission's Authority To Initiate Investigations	10
1. Congressional Intent Under The 1964 Civil Rights Act	10
2. The Congressional Intent In the 1972 Act	14
3. An Agency Regulation Cannot Override A Statutory Requirement	19
B. To Be Meaningful, The Oath Requirement Necessitates A Statement Of Fact Or The Basis For An Asserted Belief	21

TABLE OF CONTENTS—Continued

Page

C. Use Of The Effective Date Of Title VII In A Pattern Or Practice Charge Without Any Factual Basis Indicating Why It Was Considered To Constitute A "Good Faith Estimate" Of The "Date" Is Not Meaningful, Does Not Provide Proper "Notice," And, Therefore, Does Not Meet The Requirements Of Section 706(b) 24

D. A Statement Of Conclusory Allegations Of Discrimination Without Any Accompanying Factual Or Statistical Basis Does Not Set Forth Circumstances Which Are Meaningful And Verifiable For Purposes Of Oath And Notice 29

II. THE COMMISSION'S LIMITED AUTHORITY TO COMMENCE AN INVESTIGATION OR TO HAVE A SUBPOENA ENFORCED ONLY AFTER A VALID CHARGE IS FILED SHOULD NOT BE CONFUSED WITH OTHER AGENCIES' BROADER AUTHORITY 33

A. The EEOC's Investigative Authority, As Limited By Section 706(b), Cannot Properly Be Equated With That Of Other Civil Rights Enforcement Agencies 34

B. *Socal* Does Not Prohibit A Court In An EEOC Subpoena Enforcement Action From Reviewing The Validity Of A Commissioner's Charge, Since Unlike The FTC, The EEOC's Investigatory Authority Is Contingent Upon The Filing Of A Valid Charge Under Section 706(b) 36

C. The Solicitor Has Overstated The Effect Of A Decision In This Case On The Commission And Other Agencies 38

TABLE OF CONTENTS—Continued

Page

III. GUIDANCE BY THIS COURT IS ESSENTIAL TO PREVENT FUTURE LITIGATION OVER THE AMOUNT OF DETAIL PROVIDED IN A COMMISSIONER'S CHARGE.... 39

CONCLUSION 43

APPENDIX A 1a

APPENDIX B 2a

APPENDIX C 4a

TABLE OF AUTHORITIES

Cases: Page

Adolph Coors Co. v. EEOC, 464 F.2d 1270 (10th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973).... 32
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 43
Bowaters Southern Paper Corp. v. EEOC, 428 F.2d 799 (6th Cir.), *cert. denied*, 400 U.S. 942 (1970) 32, 33
EEOC v. A.E. Staley Manufacturing Co., —— F.2d ——, 32 FEP Cases 279 (7th Cir. 1983).... 25, 31
EEOC v. Anchor Continental, 74 F.R.D. 523 (D.S.C. 1977) 23
EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981) 23
EEOC v. Appalachian Power Co., 13 FEP Cases 1294 (W.D. Va. 1976), *aff'd*, 568 F.2d 354 (4th Cir. 1978) 14, 17, 21
EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) 42
EEOC v. Container Corp. of America, 352 F. Supp. 262 (M. D. Fla. 1972) 12
EEOC v. Datapoint Corp., 457 F. Supp. 62 (W.D. Tex. 1978) 23
EEOC v. Dean Witter Co., Inc., 643 F.2d 1334 (9th Cir. 1980) 14, 25, 31, 37
EEOC v. Ipco Hospital Supply Co., 32 FEP Cases 130 (S.D.N.Y. 1983) 23
EEOC v. K-Mart Corp., 694 F.2d 1055 (6th Cir. 1982) 14, 25, 28, 31, 37
EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1968) 11, 37
EEOC v. Union Camp Corp., 536 F. Supp. 64 (W.D. Mich. 1982) 22
EEOC v. Western Electric Co., 382 F. Supp. 787 (D. Md. 1974) 23
Emerson Electric Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979) 27
Ford Motor Co. v. EEOC, 102 S.Ct. 3057 (1982).... 42
FTC v. Standard Oil Co., 449 U.S. 232 (1980).....8, 34, 38

TABLE OF AUTHORITIES—Continued

Page

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 20
General Employment Enterprises, Inc. v. EEOC, 440 F.2d 783 (7th Cir. 1971) 32
General Tel. Co. of the Northwest v. EEOC, 446 U.S. 318 (1980) 10, 15
Graniteville Co. v. EEOC, 438 F.2d 32 (4th Cir. 1971) 12, 37
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 10
Hazelwood School District v. United States, 433 U.S. 299 (1977) 41
Hunt Foods and Industries, Inc. v. FTC, 286 F.2d 803 (9th Cir.), *cert. denied*, 365 U.S. 877 (1961) 11
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 10, 41
Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949) 21, 22
Local 104, Sheet Metal Workers v. EEOC, 439 F.2d 237 (9th Cir. 1971) 32, 33
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 29, 39
Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 18, 20, 26
Mountain States Telephone & Telegraph Co. v. EEOC, 466 F.2d 541 (10th Cir. 1972) 32
Movement for Opportunity v. General Motors, 622 F.2d 1235 (7th Cir. 1980) 41
New Orleans Public Service, Inc. v. Brown, 369 F. Supp. 702 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975) ..12, 17, 18, 32, 33
Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355 (1977) 10, 18
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) 11, 36
Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 20
Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334 (E.D. Wis. 1956) 21
Sparton Southwest, Inc. v. EEOC, 461 F.2d 1055 (10th Cir. 1972) 32

TABLE OF AUTHORITIES—Continued

	Page
Stewart v. Core Laboratories, Inc., 460 F. Supp. 931 (N.D. Tex. 1978)	17
United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977)	41
United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981)	37
United States v. Johns-Manville Corp., 245 F. Supp. 74 (E.D. Pa. 1965)	21
United States v. Morton Salt Co., 338 U.S. 632 (1950)	11
United States v. Powell, 379 F.2d 48 (1964)	37
United States v. Zagari, 419 F. Supp. 494 (N.D. Cal. 1976)	22
United Steelworkers of America v. Weber, 443 U.S. 193 (1979)	43
White v. North La. Legal Assistance Corp., 468 F. Supp. 1347 (W.D. La. 1979)	20
Statutes and Regulations:	
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e, *et seq.*	*passim*
Section 706(a), 42 U.S.C. § 2000e-5(a) (1970), Pub. L. No. 88-352, 78 Stat. 259	10, 13
Section 706(b), 42 U.S.C. § 2000e-5(b)	*passim*
Section 707(a), 42 U.S.C. § 2000e-6(a)	35
Section 707(e), 42 U.S.C. § 2000e-6(e)	35
Section 709(a), 42 U.S.C. § 2000e-8(a)	28
Section 715, 42 U.S.C. § 2000e-14	36
Public L. 92-261, March 24, 1972	14
15 U.S.C. § 43	11
15 U.S.C. § 45(b)	37
15 U.S.C. § 46	11
29 U.S.C. § 211(a)	11
29 C.F.R.:	
Section 1601.12(a)(3)	6, 19
Section 1601.12(b)	19, 20
Section 1601.14(a)	19
Section 1601.20(a)	42
Section 1602.14(a)	25

TABLE OF AUTHORITIES—Continued

Legislative Materials: Page

Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W.S. Hein & Co.) 11, 13
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Black's Law Dictionary, Fifth Edition (West Publishing Co. 1979) 29
EEOC Compliance Manual (BNA):
§ 16 42
§ 16.3 ..... 20, 27
Executive Order 12067, 44 Fed. Reg. 1055 (1978).. 27, 36
Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended by* Exec. Order 11375, 32 Fed. Reg. 14303 (1967), and Exec. Order 11478, 34 Fed. Reg. 12985 (1969), *reprinted in* 42 U.S.C. § 2000e (1981) at 19, *et seq.* 26, 27, 34
Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978) 27, 36
Webster's New World Dictionary (Simon & Schuster 1980) 29

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BRIEF FOR RESPONDENT SHELL OIL COMPANY

STATEMENT OF THE CASE

On September 27, 1979, Eleanor Holmes Norton, then Chair of the Equal Employment Opportunity Commission ("EEOC" or "the Commission"), issued a Commissioner's charge alleging discrimination by Shell Oil Company ("Shell")[1] at Shell's Wood River, Illinois refinery. The charge set forth neither the relevant dates of the

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[1] The parent companies and current affiliates of Shell are set forth in Appendix A, *infra*.

alleged violations nor any specific factual basis for the charge.[2]

Shell was served with a notice of and a copy of the charge on October 26, 1979. (J.A. 62).[3] Like the charge itself, the notice contained neither the relevant dates of the alleged violations nor the factual basis for the charge. Accompanying the notice and the charge was a letter from the District Director of EEOC and a "First Request For Information." (J.A. 64-82). In the request for information, the Commission sought extensive data on virtually every aspect of employment at the Wood River facility. Following discussions with the Commission regarding the request for information, Shell advised the Commission by letter dated March 7, 1980, that there had been no race or sex discrimination charges filed against the Wood River facility in the previous six years and that the only two charges filed in the previous decade had been dismissed. In addition, Shell expressed concern over the lack of specificity in the charge and requested additional information from the Commission regarding the basis for the charge. (J.A. 89-93). On May 15, 1980, EEOC issued an administrative subpoena seeking the previously requested information. (J.A. 112-127).

In its petition to revoke or modify the subpoena, Shell argued, among other grounds, that the charge was invalid because of its failure to adhere to the requirements of Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), as amended. (J.A. 140-145).[4] Following the Commis-

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[2] The charge is set forth in Appendix B, *infra*.

[3] "J.A." refers to the Joint Appendix prepared and filed herein pursuant to Supreme Court Rule 30.

[4] Section 706(b) reads in pertinent part as follows:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (*in-*

sion's final denial of Shell's petition to revoke or modify the subpoena (J.A. 164-168), Shell filed a complaint for declaratory and injunctive relief in the United States District Court for the Eastern District of Missouri. (J.A. 169-182). In its complaint, Shell sought, among other things, a declaration that the Commissioner's charge was invalid because of the Commission's failure to adhere to the statutory requirements of Section 706(b) of Title VII. *Id.* On January 16, 1981, Commissioner Norton amended the charge "to state that I have reason to believe that the named employer had engaged in the identified unlawful employment practices on a continuing basis from at least July 2, 1965, until the present."[5] Subsequently, the Commission filed an action in the United States District Court for the Southern District of Illinois to enforce its administrative subpoena (J.A. 57), which action was ordered transferred to the Eastern District of Missouri and ultimately consolidated with Shell's suit. (J.A. 4-5). The District Court (Cahill, J.), in an opinion reported at 523 F. Supp. 79, ordered that the Commission's subpoena should be enforced. (Pet. App. 15a-31a).[6] Shell appealed.

The Eighth Circuit, in an opinion reported at 676 F.2d 322, held that the Commissioner's charge failed to satisfy the requirements of Section 706(b) due to its failure to advise Shell adequately of the "date" and "circumstances" of the alleged violations. (Pet. App. 1a-14a). The panel's original opinion reflected an apparent as-

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cluding the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . within ten days and shall make an investigation thereof. *Charges shall be in writing under oath or affirmation* and shall contain such information and be in such form as the Commission requires. (Emphasis added).

[5] The amended charge is set forth in Appendix C, *infra*.

[6] "Pet. App." refers to the Appendix to the Commission's petition for a writ of certiorari.

sumption by the court that the Commissioner's charge was based on an individual charge of discrimination.[7]

In its Petition for Rehearing, the Commission for the first time informed the court that the Commissioner's charge was not based on an individual complaint, but rather was based on statistical data filed with it or with other federal agencies. 676 F.2d at 325 n.5. Apparently based on the Commission's revelation, but on its own motion, the panel modified its original opinion. (Pet. App. 10a-14a). In its modified opinion, the panel stated that the notice required by Section 706(b) "should at least inform the employer of the approximate dates of the unlawful practices and include enough other information to more fully identify the information that has been used as the basis for the subpoena." 676 F.2d at 325. The panel stated that:

> We do not read 42 U.S.C. § 2000e-5 as prohibiting the filing of a Commissioner's charge which is based on statistical data obtained by the Commissioner from annual reports. We do hold, however, that the basic information that the charge is based on statistical data and the general nature of that data, including dates, should be disclosed in the charge. *Id.* at 325 n.5.

With regard to the "date" element of Section 706(b), the court stated that the use of July 2, 1965 (the effective date of Title VII) was not sufficient, since such a "date" did not give adequate notice to the employer of the parameters of the investigation. *Id.* at 325. The court read Section 706(b) as requiring a "basis in fact" for the date alleged in the charge, and found no factual basis in the allegation of July 2, 1965, as the beginning date of the alleged violations. *Id.*

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[7] For example, the original opinion stated that the charge should include "the date on which a charge was filed with the Commission by an *aggrieved individual*" as well as the position of the aggrieved individual. (Pet. App. 8a) (emphasis added).

Similarly, the court held that the statement of "circumstances" must be supported by "some factual or statistical basis." *Id.* at 326. The panel stated that notice of the factual basis for the charge "enables the parties to determine whether conciliation is an appropriate remedy and aids the court and the employer in determining what evidence is relevant for discovery and what records must be retained in accordance with EEOC regulations." *Id.* Finally, the court summarized the information that should be included in a sufficient Commissioner's charge as follows:

> [T]he type of information upon which the charge is based; the approximate dates of the alleged unlawful employment practices; the nature of the charge (e.g., failure to hire, failure to promote, dismissal); and if an individual charge has been filed, the position of the aggrieved individual (e.g., applicant, employee, former employee). *Id.*

At the same time that the panel issued its modified opinion, the Eighth Circuit denied the Commission's petition for rehearing en banc, with Chief Judge Lay dissenting. (Pet. App. 34a-39a). The Commission's petition for a writ of certiorari was filed on November 16, 1982, and was granted on February 22, 1983. (J.A. 183).

SUMMARY OF ARGUMENT

As originally enacted in 1964, Title VII required that a Commissioner's charge be based on "reasonable cause" to believe a violation of the Act had occurred. Congress intended this requirement to serve as a meaningful constraint on the Commission's authority to initiate investigations. In addition, Congress intended the Commission to have authority to act only on a "specific charge" of discrimination.

Section 706(b), as amended in 1972, requires that a Commissioner's charge be under "oath or affirmation" and that the employer receive notice of the "date, place and circumstances" of the alleged violations. Both the

"oath or affirmation" and "date, place and circumstances" requirements placed an obligation on the Commission to provide greater detail in its charges than had been required under the 1964 Act.

In order for the "oath or affirmation" requirement of Section 706(b) to have legal consequence, a Commissioner's charge must contain statements of fact, not merely statements of belief or conclusory allegations. Since it is virtually impossible to prove or disprove a Commissioner's *belief* that an employer has engaged in discriminatory practices, a factual basis for that belief must be revealed in the charge. Thus, there is a vital link between the oath or affirmation requirement and the notice requirement of date, place and circumstances. A court must be informed of the factual basis for a charge if there is to be any meaningful statutory safeguard against a Commissioner's filing of an unfounded charge.

The clear language of Section 706(b) of Title VII mandates that an employer who is charged with violating Title VII must be given notice of the "date, place and circumstances" of the alleged violations. In addition to this statutory requirement, the Commission's own regulations require "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12 (a)(3). Any discretion which Section 706(b) may give to the Commission to determine the form and content of charges does *not* authorize the Commission to issue a regulation which ignores the statutorily required notice of date and circumstances.

The Eighth Circuit in this case correctly held that the mere reference to the effective date of Title VII, without more, does not satisfy the "date" requirement of Section 706(b). The inclusion of the effective date of Title VII by itself is not a sufficient statement of the "date," since it does not provide any basis for a court to determine why the Commission considers such to be a "good faith

estimate" of the probable time periods of the alleged violations. Indeed, the effective date of Title VII provides no more notice than the Act itself and, thus, does not provide a basis for determining whether the information requested in a subpoena is material and relevant to the charge.

The Eighth Circuit also correctly held in this case that a mere recitation of general allegations of discrimination without any illuminating facts is not sufficient to meet the "circumstances" requirement of Section 706(b). The requirement that the Commission set forth some basis in fact for the alleged violations is consistent with a plain reading of Section 706(b) and the Commission's own regulations. This requirement will provide reasonable notice to the charged employer without unnecessarily interfering with the functioning of the Commission. In the absence of a reasonably specific notice of the "circumstances" of the alleged violations, neither the charged employer nor a court which is asked to enforce a subpoena can determine whether the Commission has acted within its lawful authority.

Affirmance of the Eighth Circuit's decision will not impose "technical pleading requirements" on the Commission or otherwise unduly burden or impede it in its work. It merely will require the Commission to adhere to the oath requirement and the plain meaning of the "date, place and circumstances" language of Section 706(b).

The limited, charge-based investigatory authority of the Commission is in contrast to the self-initiating authority of many other federal agencies which Congress expressly refused to grant the Commission. Since the Commission is without authority to commence an investigation in the absence of a valid charge of discrimination, a court which is asked to enforce a Commission subpoena *must* determine the validity of the charge. Thus, a valid Commissioner's charge is not a discretionary "threshold

determination" as in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) ("*Socal*"), but rather is a *condition precedent* to any EEOC investigatory authority. Accordingly, the concerns which this Court expressed in *Socal* regarding the interruption of *discretionary* agency functions in their early stages are not applicable in the instant case.

In addition to affirmance of the decision below, guidance by this Court is essential to avoid needless confusion and litigation over the amount of detail necessary in statistically-based Commissioner's charges alleging pattern or practice violations. Disclosure of the statistical bases of such charges will not interfere with the functions of the Commission under Title VII but instead will further the investigatory and conciliatory processes of the Commission.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE COMMISSIONER'S CHARGE HEREIN WAS INVALID BECAUSE IT CONTAINED NEITHER A GOOD FAITH ESTIMATE OF THE PROBABLE DATE NOR SUFFICIENT INFORMATION TO MEET THE OATH AND NOTICE REQUIREMENTS OF TITLE VII.

It is important to emphasize at the outset what this case does *not* involve.

First, it does not involve a challenge to the Commission's investigatory authority *after* a valid charge of discrimination has been filed. Once a valid charge has been filed, the Commission may seek information which is relevant and material to the charge.

Second, the decision of the Eighth Circuit in this case did not impose a requirement that the Commission must demonstrate "reasonable cause" or "probable cause" before a subpoena may be enforced. Nor did the decision below impose strict technical pleading or evidentiary requirements on the Commission (as argued by the Solicitor). What the court below did require is that a valid

Commissioner's charge of discrimination must meet the explicit "oath" and "notice" requirements of Section 706 (b) by properly setting forth the "date, place and circumstances" of the alleged violations.

Third, this case does not call into question other statutes under which agencies may commence investigations based on "reasonable cause" or "reason to believe" a violation exists. Since Section 706(b) does not contain a "reasonable cause" or "reason to believe" standard, a decision in this case should not affect agencies which have a reasonable cause standard.

Since a valid charge is a condition precedent to the investigatory authority of the Commission,[8] a court which is called upon to enforce a Commission subpoena *must* determine that the charge meets all the requirements of Section 706(b)—including a proper specification of the "date, place and circumstances" of the alleged violations. Therefore, what this case *does* involve is a relatively straight-forward interpretation of the meaning of the oath and notice (of the "date" and "circumstances") requirements of Section 706(b) of Title VII.[9]

Although the statutory requirements are clear from the plain language of Section 706(b), it is helpful to observe that Congress intended to restrict the investigative powers of the Commission and to prevent the unbridled use of Commissioner's charges. This intent is reflected in the legislative history of both the 1964 Act and the 1972 Amendments to the 1964 Act.

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[8] The Commission has conceded that a valid charge of discrimination is a "condition precedent" or "prerequisite" to a Commission investigation. (Pet. Br. 30, 33). ("Pet. Br." refers to the Solicitor's brief on the merits in this matter). In addition, *see* pp. 10-12, 14 and 33-38, *infra*.

[9] The Commissioner's charge at issue herein stated that the "place" of the alleged violations was Shell's Wood River Refinery. Compliance with the "place" requirement of Section 706(b) thus is not contested in this case. *See* 676 F.2d at 325 n.4.

A. Congress Intended The Requirements For The Issuance Of a Commissioner's Charge To Serve As A Meaningful Constraint Upon The Commission's Authority to Initiate Investigations.

1. *Congressional Intent Under The 1964 Civil Rights Act*

Under Title VII, as originally enacted in the 1964 Civil Rights Act, the authority of the Commission was limited to the investigation of charges of employment discrimination and informal methods of conciliation and persuasion.[10] If it were unable to effect conciliation of a charge, the Commission had no authority to commence an enforcement action. Enforcement was limited to "pattern or practice" actions by the Department of Justice and private actions by a charging party after unsuccessful efforts by the Commission to conciliate. *See General Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 325-26. (1980); *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 358-59 (1977).

The Commission's investigative authority itself was limited. The intent of Congress to circumscribe this authority was clearly expressed in the Interpretative Memorandum of Senators Clark and Case: [11]

> It is important to note that the Commission's power to conduct an investigation can be exercised only after a specific charge had been filed in writing. In this respect *the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission*, 15 U.S.C. 43, 46, *or of the Wage*

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[10] Section 706(a), 42 U.S.C. § 2000e-5(a) (1970), (Pub. L. No. 88-352, 78 Stat. 259).

[11] Senators Clark and Case were the "bipartisan captains" responsible for Title VII during the Senate debate. The Clark-Case Interpretative Memorandum has been relied upon by this Court on numerous occasions, *see International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 350-51 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 and n.11 (1971), and is an authoritative indicator of the meaning of the provisions of Title VII.

> *and Hour Administrator*, 29 U.S.C. 211, who are authorized to conduct investigations, inspect records, and issue subpenas, whether or not there had been any complaint of wrongdoing. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Hunt Foods and Industries, Inc. v. Federal Trade Commission*, 286 F.2d 803, 806-807 (C.A. 9, 1961), *cert. denied*, 356 [sic] U.S. 877 (1961). Interpretative Memorandum on Title VII of Senators Clark and Case, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W. S. Hein & Co.), at 3045. (Emphasis added).[12]

The Congressional intent to make a valid charge a condition precedent to the Commission's investigative authority has been recognized uniformly by the courts. In *EEOC v. Union Bank*, 408 F.2d 867, 870 (9th Cir. 1968), the Ninth Circuit held that where a valid complaint had not

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[12] In light of this legislative history, the Solicitor's reliance on FTC cases is incorrect. In particular, his reliance on *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), for the apparent proposition that EEOC may "exercise powers of original inquiry" (Pet. Br. 40), is misplaced because EEOC clearly possesses no such "powers of original inquiry" as those contained in 15 U.S.C. §§ 43 and 46. As set forth above, the legislative history specifically cited the FTC case of *Hunt Foods and Industries, Inc. v. FTC*, 286 F.2d 803, 806-07 (9th Cir.), *cert. denied*, 365 U.S. 877 (1961), as an example of the kind of authority which EEOC would *not* possess. The distinction between the authority of the FTC and that of EEOC is discussed further in part II, *infra*.

Section 11(a) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 211(a), provides that the Administrator of the Wage and Hour Division may conduct such investigations "as he may deem necessary or appropriate to determine whether any person has violated any provision" of the Act. The reliance by the Solicitor on *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (Pet. Br. 43), is therefore similarly misplaced. That case involved the broader authority of the Wage and Hour Administrator under the FLSA. Moreover, as set out above, *Oklahoma Press* was cited specifically in the legislative history as another example of the authority which Congress specifically withheld from the EEOC.

been filed with the agency, "the Commission was without jurisdiction to issue the demand for production." Likewise, in *Graniteville Co. v. EEOC*, 438 F.2d 32, 35 (4th Cir. 1971), the Fourth Circuit stated that "the EEOC is without jurisdiction to proceed in the absence of a valid charge."[13] *See also New Orleans Public Service, Inc. v. Brown*, 369 F. Supp. 702, 712 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975); *EEOC v. Container Corp. of America*, 352 F. Supp. 262, 265 (M.D. Fla. 1972) ("The Court views each one of the deliberate steps in this statutory scheme—charge, notice, investigation, reasonable cause, conciliation—as intended by Congress to be a condition precedent to the next succeeding step and ultimately legal action.").

While the 1964 Act authorized Commissioners to issue charges, it is clear from the legislative history that the sole reason for this authority was to protect individuals who were fearful of reprisal if they themselves filed a charge:

> We must have the ability to get the Commission into action, for the purpose of eliminating discrimination, without requiring complaint by an aggrieved party in every case, because intimidation of individuals in areas where this is most necessary, whether it be economic, social, or any other kind of intimidation,

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[13] The Fourth Circuit also stated in *Graniteville*, 438 F.2d at 41 that:

> Congress sought to control mere "fishing expeditions" by requiring investigations to be preceded by the filing of a charge by a party claiming to be aggrieved or by a Commissioner with sufficient prior information to have reasonable cause to believe that a statutory violation had occurred. The amendment makes clear not that the EEOC may not subpoena all evidence that "relates to any matter under investigation or in question," but that *properly filed charges are the only "matters" which can be "under investigation or in question."* (Emphasis added).

> may, in many cases, prevent the filing of complaints by aggrieved persons. Legislative History of Titles VII and XI of the Civil Rights Act of 1964, *supra*, at 3305 (remarks of Senator Case).[14]

This limited authority to issue Commissioner's charges was restricted further by Section 706(a) of Title VII, which provided that a Commissioner's charge could be filed where the Commissioner had "reasonable cause" to believe a violation of the Act had occurred and where the charge set forth the "facts" on which it was based.[15] Congress intended these requirements of Section 706(a) to operate as a check on unbridled Commission discretion to issue and investigate charges of discrimination:

> Mr. Chairman, I think the chairman will agree with me that *this is a section to protect us from errant and arrogant bureaucracy—from any administrator running wild without any reasonable cause.* • • • We very carefully provided that there had to be reasonable cause to believe that there had been a violation before any administrator moved into a situation. Legislative History of Titles VII and XI of the Civil Rights Act of 1964, *supra*, at 3313

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[14] The courts in cases involving a Commissioner's charge, until this one, apparently had assumed that the Commissioner's charge at issue was based on an underlying individual charge of discrimination filed by a person who wished to remain anonymous. It was not until its petition for rehearing in the Eighth Circuit in this case that the Commission indicated to the court that there was *no* underlying individual charge involved and that the charge herein was the product of the agency's Office of Systemic Programs. 676 F.2d at 325 n.5.

[15] Section 706(a) read in pertinent part as follows:

> Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has *reasonable cause* to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer . . . has engaged in an unlawful employment practice, the Commission shall furnish such employer . . . with a copy of such charge. . . . (Emphasis added).

remarks of Congressman Goodell). (Emphasis added).[16]

Thus, it is clear that in 1964 Congress intended to define and circumscribe carefully the authority of the Commission under Title VII—and, in particular, the Commission's use of Commissioner's charges. Although the 1972 Amendments expanded the authority of the Commission to enable it to obtain enforcement and to bring pattern or practice cases, it is clear that the Amendments did not reduce the requirements for a Commissioner's charge, but instead, made them more stringent.

2. *The Congressional Intent In the 1972 Act*

The 1972 Amendments to Title VII[17] are significant not only for what they did, but also for what they did *not* do. First, the Amendments did not grant the Commission cease and desist enforcement authority as originally proposed. Instead, the Amendments empowered the Commission to institute suit to effect enforcement of the Act where conciliation attempts had failed. Second, the Amendments did not transfer the audit authority of the Office of Federal Contract Compliance (now the Office of Federal Contract Compliance Programs—the "OFCCP") to the Commission as originally proposed. Instead, the investigative authority of the Commission remains subject to the filing of a valid charge of discrimination.[18] Third,

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[16] Congressman Celler also acknowledged the intended limits on the Commission's authority when he stated:

> In other words, we want to be sure that before the member of the Commission acts he has reasonable cause to believe a violation of the act occurred. We want unequivocally to nail down that condition precedent [to a Commissioner's charge] and, therefore, we provide for this additional language. *Id.*

[17] Pub. L. 92-261, March 24, 1972.

[18] *See, e.g., EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1061 (6th Cir. 1982); *EEOC v. Dean Witter Co., Inc.*, 643 F.2d 1334, 1338 (9th Cir. 1980); *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978). While it is true that Title VII establishes "an

although the pattern or practice functions of the Attorney General in the private sector were transferred to the Commission, such functions were made subject to the requirements of Section 706 of the Act—the functions did not remain subject to the "reasonable cause to believe" standard upon which the Attorney General's authority was based. Overall, the basic purpose of the Amendments, "to secure more effective enforcement of Title VII," was effected "by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII." *General Tel. Co. of the Northwest v. EEOC*, *supra*, 446 U.S. at 325. Congress was not seeking to eliminate or reduce the requirements for a Commissioner's charge or expand the Commission's investigative authority.

The 1972 Amendments made two major changes in the requirements for a Commissioner's charge under Title VII. First, rather than requiring that a Commissioner's charge be based on "reasonable cause," a Commissioner now is required to issue the charge under "oath or affirmation." Second, instead of stating in the charge the "facts" on which the charge was based, Section 706(b) now requires that the Commission "shall serve a notice of the charge (including the date, place and circumstances)" of the alleged violations.[19] Although there is little in the legislative history of the 1972 Amendments to explain why these changes were made, the legislative history suggests that they were the result of a compromise in Conference Committee. The nature of the compromise suggests an intent to make the requirements for a Commissioner's charge more stringent than the previous "reason to believe" standard.

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integrated multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court" (Pet. Br. 14), a valid charge under Section 706(b) is a condition precedent to the remaining steps of the process.

[19] The relevant portions of Section 706(b) are set forth at n.4, *supra*.

As passed by the House, H.R. 1746 retained the "reasonable cause to believe" standard for a Commissioner's charge and the requirement that a charge set forth the facts on which it is based, but provided that a copy of the charge should be furnished to the respondent within five days of its filing. Legislative History of the Equal Employment Opportunity Act of 1972 at 327-28 (1972). S. 2515, the bill passed by the Senate, provided that all charges should be under "oath or affirmation," that the Commission could file a charge "*upon the request of any person claiming to be aggrieved*," and that "the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" upon the employer within 10 days. *Id.* at 1780. (Emphasis added).[20] The Conference Committee reported that the conflicting bills were compromised in the following manner:

> The Senate receded with an amendment providing that charges be filed by or on behalf of the person claiming to be aggrieved or by a member of the Commission, alleging that an unlawful employment practice occurred. Charges are to be in writing under oath or affirmation and in such form as the Commission requires. A notice of a charge including the date, place and circumstances of the alleged unlawful employment practice is to be served on the respondent within 10 days. *Id.* at 1814, 1836.

Although the Senate "receded" from its position that a charge could be issued by a Commissioner only upon the request of an aggrieved individual, the language agreed

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[20] The Senate requirement to provide notice (in contrast to the House proposal to provide a copy of the charge) obviously was intended to meet the dual purposes of (1) insuring due process by providing a respondent with prompt notice, and (2) protecting an individual grievant from potential retaliation. It would be anomolous if, in seeking to protect the grievant's identity by a "notice" of the charge, the Senate intended the notice to be prompt, but not necessarily meaningful.

to by the Conference Committee did not use either the House-proposed "reasonable cause to believe" standard or the House proposal for providing a copy of the charge to the respondent within five days. These exceptions are significant. Because there would be no point for the Senate to "recede" from its original position to a position less stringent than that originally proposed by the House, the compromise strongly suggests that the oath requirement was intended to be more (not less) stringent than the "reasonable cause to believe" standard. The fact that the compromise utilized the Senate's notice requirement also suggests an intent by Congress to require greater specificity than the previous requirement that a charge disclose the "facts" upon which it is based.

Several courts which have considered the issue have concluded that the oath requirement is more stringent than the "reasonable cause to believe" standard. In *EEOC v. Appalachian Power Co.*, the court reasoned that:

> This heightened responsibility, a charge under oath replacing a charge based on reasonable belief, for issuance of a commissioner's charge, certainly creates a stricter burden on the Commission. . . . [T]hat is the clear import of the language Congress placed in the Act in 1972. 13 FEP Cases 1294, 1295 (W.D. Va. 1976), *aff'd for reasons set forth by the District Court*, 568 F.2d 354 (4th Cir. 1978).

In *Stewart v. Core Laboratories, Inc.*, the court concluded:

> [T]he 1972 Amendment requires the Commission to file charges "upon an oath or affirmation," rather than upon the less onerous requirement of "reasonable cause." 460 F.Supp. 931, 933 (N.D. Tex. 1978).

Similarly, in *New Orleans Public Service, Inc. v. Brown*, *supra*, 369 F. Supp. at 708, the court stated that "[w]ithout doubt, this modification on the requisites, a charge under oath replacing a charge based on reasoned belief,

for issuance of a Commissioner's charge created a stricter burden." [21]

Not only is there legislative history indicative of a Congressional intent to retain and make more stringent the requirements for a Commissioner's charge, there is nothing in the legislative history to suggest that Congress intended anything other than the plain meaning of the language enacted in Section 706(b). As this Court noted in *Mohasco Corp. v. Silver*, 447 U.S. 807, 819 (1980), it is the court's "task to give effect to the statute *as enacted*." (Emphasis added). "Only if the legislative history of [the section] cannot mean what it so clearly seems to say would there be any justification for construing it in any other way." *Occidental Life Ins. Co. of Cal v. EEOC*, *supra*, 432 U.S. at 361. There is *no* legislative history which would suggest a Congressional intent other than the plain language of Section 706(b) that a charge be under oath or affirmation and that employers be furnished with reasonably specific notice of the "date, place and circumstances" of alleged violations.[22]

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[21] The court also noted that "[b]olstering this stricter burden produced by the charge under oath requirement of the amended Civil Rights Act is the concomitant requirement that the charge set forth the date, place, and circumstances of the alleged unlawful employment practices." *Id.* at 708 n.3. Although not all courts have concluded that the "oath" requirement in the 1972 Amendments imposes a heavier burden on Commissioner's charges than had been imposed under former section 706(a), no court has held that by the 1972 Amendments Congress intended to require less for a proper Commissioner's charge.

[22] The Solicitor contends that by the 1972 Amendments "Congress eliminated any factual pleading requirement entirely, substituting instead the notice provisions of Section 706(b)." (Pet. Br. 21). This comment misses the point. First, the comment overlooks the oath requirement. See section I. B, *infra*. Second, while the oath and notice requirements imposed by the 1972 Amendments do not constitute "factual pleading requirements," they were nonetheless intended to serve a purpose. Third, there is *nothing* in the 1972 legislative history to indicate that Congress had any lessened concern about an "errant and arrogant bureaucracy" (*see* page 13, *supra*),

3. *An Agency Regulation Cannot Override A Statutory Requirement*

Citing the language of Section 706(b) that provides that charges "shall contain such information and be in such form as the Commission requires," the Solicitor maintains that "Congress . . . expressly left the form and content of Section 706(b) charges to Commission discretion." (Pet. Br. 21). The Solicitor further asserts that the Commission has exercised this discretion by providing in 29 C.F.R. § 1601.12(b), that "a charge is sufficient when the Commission receives from the person making the charges a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." (Pet. Br. 15). On the basis of these two sources, the Solicitor argues not only that the instant charge was sufficient because it complied with the Commission's regulations (Pet. Br. 15) but also that courts err if they "[substitute their] own sufficiency requirements for those adopted by the Commission." (Pet. Br. 16). These assertions err on two grounds.

First, the Solicitor's assertions ignore the Commission's own regulations contained in 29 C.F.R. § 1601.12(a)(3) and 29 C.F.R. § 1601.14(a). The former provides that each charge should contain:

> [a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices.

The latter regulation provides:

> the respondent will be served with a notice of the charge within ten days after the filing of the charge (including the date, place, circumstances and identity of the person filing the charge . . .).

These regulations merely carry out the express statutory language of Section 706(b). The obvious purpose of Sec-

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than it had in 1964. Thus, it can only be concluded that Congress meant those requirements to continue to act as a rein on the Commission.

tion 1601.12(b), however, is to provide latitude for unsophisticated individuals, not to shield Commissioner's charges from the statutory requirements.[23]

Second, and more importantly, the general statutory provision that the Commission may determine the form and content of a charge cannot override the specific statutory requirements that a charge be under "oath or affirmation" and that the respondent be provided with notice of the "date, place and circumstances" of the alleged violations. The only reasonable reading of Section 706(b) is that the Commission has discretion to determine the form and content of a charge within the bounds of the statutory requirements. This Court noted in *Mohasco Corp v. Silver, supra*, 447 U.S. at 825:

> We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its "interpretation" of the statute cannot supersede the language chosen by Congress.

See also General Electric Co. v. Gilbert, 429 U.S. 125, 140-42 (1976).

Without referring to any source, the Solicitor also asserts that the Commissioner's "decision to initiate the administrative process in this case was well within her lawful discretion." (Pet. Br. 43). Such an assertion ig-

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[23] Some courts have held that charges filed by a layman may be construed liberally since the persons filing the charges may not be sophisticated in the law. *See, e.g., Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970); *White v. North La. Legal Assistance Corp.*, 468 F. Supp. 1347, 1351-52 (W.D. La. 1979). The Solicitor maintains, however, that the instant charge was a product of the Commission's "systemic" program, and, as such, it should have been reviewed at successive stages of the process, by professionals in the agency, including a number of attorneys. *See* EEOC Compliance Manual (BNA) § 16.3. Thus, there is no reason with systemic Commissioner's charges to apply the same "liberal reading" as some courts have to charges filed by unsophisticated laymen.

nores the statutory requirements of Section 706(b). As noted at pp. 10-12, *supra*, Congress expressly declined to give the Commission discretionary authority to initiate investigations. *See also* discussion in Section II, *infra*.

B. To Be Meaningful, The Oath Requirement Necessitates A Statement Of Fact Or The Basis For An Asserted Belief.

As discussed above, a valid charge is a condition precedent to the investigative authority of the Commission and, for a charge to be valid, it must meet the oath and notice requirements of Section 706(b).

In order for the "oath or affirmation" requirement to have meaning and to serve its intended purpose, the requirement necessitates something more than a mere declaration of belief and generalized conclusions. A document, such as the instant charge, which is required by federal statute to be issued under oath or affirmation must meet the requirements for an affidavit if the oath is to be an enforceable safeguard. *See Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 354 (D.C. Cir. 1949). The requirements for an affidavit are set forth in 3 Am. Jur.2d *Affidavits* § 20 (2d ed. 1962) as follows:

> If possible, an affidavit should be made by one having actual knowledge of the facts, and its allegation should be of the pertinent facts and circumstances, rather than conclusions, and should be full, certain, and exact. . . . The affidavit may be in the form of a verification, that is, a sworn statement of the truth of the facts stated in the instrument verified.

See United States v. Johns-Manville Corp., 245 F. Supp. 74, 83-85 (E.D. Pa. 1965); *Sears, Roebuck & Co. v. American Plumbing & Supply Co.*, 19 F.R.D. 334, 339 (E.D. Wis. 1956).

Where a sworn statement is based on information and belief, it nevertheless should contain the source of the affiant's information and the grounds for the belief so that a court can determine if the belief is well-founded. 3 Am. Jur.2d *Affidavits* § 22 (2d ed. 1962); *see also Johnston Broadcasting Co. v. FCC*, *supra*, 175 F.2d at 354-56; *United States v. Zagari*, 419 F. Supp. 494, 504 (N.D. Cal. 1976).

The instant charge did not meet any of these standards: it contained no specific information, no factual basis for the charge, and no grounds for the belief expressed therein. Therefore, the "oath or affirmation" requirement was rendered unenforceable and meaningless. It is utterly impossible for a court which is asked to enforce the subpoena issued pursuant to this charge to determine whether the oath was taken in good faith or whether it was violated.

The Solicitor argues that the good faith of federal officials can be presumed and that it provides a sufficient check on possible agency abuses without requiring the need "for the federal courts to erect additional barricades." (Pet. Br. 38). It is not the federal courts that have erected these requirements but, rather, Congress itself by the plain language of Section 706(b). In any event, unfortunately, the "good faith of high level government officials" (Pet. Br. 39), has not prevented the Commission from filing and pursuing irresponsible charges. In *EEOC v. Union Camp Corp.*, 536 F. Supp. 64, 66 (W.D. Mich. 1982), the court stated:

> This matter is a prime example of an attitude on the part of government agencies, the EEOC in particular, which this Court has viewed with alarm from time to time. Here the charging party cries discrimination and the EEOC, *despite an utter lack of evidence*, sympathetically files suit, hoping that defendant will surrender rather than go to trial. When, as here, defendant refuses to knuckle under, EEOC goes to a lengthy trial, tries the case poorly,

> loses and hopes a lesson has been taught. (Emphasis added).

See also EEOC v. Ipco Hospital Supply Co., 32 FEP Cases 130, 132 (S.D. N.Y. 1983) ("Moreover, any doubt as to the EEOC's lack of good faith would be dispelled by the circumstance that in the course of trial its counsel deliberately attempted to deceive the Court as to a material fact"); *EEOC v. Datapoint Corp.*, 457 F. Supp. 62, 65 n.10 (W.D. Tex. 1978); *EEOC v. Anchor Continental*, 74 F.R.D. 523 (D. S.C. 1977).[24]

The court in *EEOC v. Western Electric Co.*, 382 F. Supp. 787, 801 (D. Md. 1974), clearly recognized that the Commission's good intentions do not necessarily ensure its compliance with statutory requirements:

> As a final comment, the Court is disturbed by the Commission's attitude that most of the issues raised herein are purely technical objections. It holds that its well-meaning goal of eliminating employment discrimination justifies the breach of any procedural rules or regulations. This Court cannot agree. The elimination of crime is also a desirable goal consid-

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[24] Similar Commission arguments for virtually unreviewable Title VII authority recently have been found to be unacceptable by the courts. In *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981), the court rejected Commission arguments that injunctive relief should issue as a matter of course whenever the Commission concludes that "prompt judicial action is necessary to carry out the purposes of this Act." *Id.* at 1040. Rather than defer to the Commission, the court required the Commission to meet the traditional injunctive standard of demonstrating that "irreparable harm" would result if the injunction did not issue. The court's disposition of the Commission's argument in *Anchor Hocking* also is apt here: "If Congress had intended such a result, it could have either given the EEOC independent enforcement powers or limited the court's discretion by express langua[illegible]." *Id.* at 1043. That Congress did not do so strongly suggests that the mere fact that the charge herein has been made under oath or affirmation does not absolve the charge of the need for judicial scrutiny to insure that the prerequisites of Section 706(b) have been complied with.

> ering the human waste it visits. Yet, a court could not dismiss the failure to advise an accused of his constitutional rights as a mere technicality. So, too, in this case where serious charges of discrimination have been made, the defendant cannot be stripped of all rights.
>
> The events of the past year, indeed the past month [a reference to Watergate], have taught us the meaning of that phrase "ours is a government of laws not of men." The Government expects its citizens to obey the law, and when they do not, it asks for an accounting. How strange it is that when a government official or agency breaches a statute or regulation, it is casually dismissed as a mere technicality. A government which does not respect the law certainly cannot expect its citizens to do so. *No one is above the law including the EEOC.* (Emphasis added).

Thus, the Solicitor's assurances of the Commissioners' good faith are not enough. Congress made the oath and notice requirements of Section 706(b) applicable to Commissioner's charges in order to serve as an effective rein on the Commission's authority. This Court should not interpret those requirements in a way that negates their intended effect.

C. Use Of The Effective Date Of Title VII In A Pattern Or Practice Charge Without Any Factual Basis Indicating Why It Was Considered To Constitute A "Good Faith Estimate" Of The "Date" Is Not Meaningful, Does Not Provide Proper "Notice," And, Therefore, Does Not Meet The Requirements of Section 706(b).

As observed at pp. 14-17, *supra*, the 1972 legislative history, and particularly the compromise in the Conference Committee concerning Commissioner's charges, indicates that the required notice to respondents was intended to be meaningful and not merely perfunctory. A

meaningful date is essential to provide adequate notice to enable the respondent to "preserve all personnel records relevant to the charges or action," 29 C.F.R. § 1602.14(a), and to enable a court in a subpoena enforcement action to determine relevancy. *See EEOC v. K-Mart Corp., supra*, 694 F.2d at 1064; *EEOC v. Dean Witter Co., Inc., supra*, 643 F.2d at 1338.

The date in an individual's charge is typically meaningful because it relates to a specific, identifiable event (date of termination, rejection, denial of promotion, etc.). On the other hand, because of its inherent nature, a Commissioner's charge of a pattern or practice violation may not be susceptible of such precision with respect to dates. In the case of a Commissioner's pattern or practice charge, a "good faith estimate" of the probable dates of the alleged violations has been recognized as the only practical way of meeting the date requirement. *See EEOC v. K-Mart Corp., supra*, 694 F.2d at 1064; *EEOC v. Dean Witter Co., Inc., supra*, 643 F.2d at 1338. Nonetheless, even this good faith estimate must be "meaningful." The decision below logically required the Commission to set out in the charge or notice[25] an objective (factual or statistical) basis why it considers the date given to constitute a "good faith estimate" of the dates of the alleged violations.[26]

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[25] The Eighth Circuit noted that while it was unclear from the language of Section 706(b) whether the notice of "date, place and circumstances" should be in the charge itself or in the notice of the charge, "[t]he better practice would be to include the date, place and circumstances in the charge itself." 676 F.2d at 325 n.3. *See also EEOC v. K-Mart Corp., supra*, 694 F.2d at 1062, 1064; *EEOC v. Dean Witter Co., Inc., supra*, 643 F.2d at 1337 n.2.

[26] A recent decision by a divided panel of the Seventh Circuit in *EEOC v. A.E. Staley Manufacturing Co.*, —— F.2d ——, 32 FEP Cases 279 (7th Cir. 1983), concluded that the employer had not demonstrated that the use of the effective date of the Act in that case was improper. The central issue in *Staley* apparently was whether the Commission had a *pro forma* policy of inserting the

The Solicitor's argument that the Commission's good faith must be presumed (Pet. Br. 39) is unpersuasive for two reasons. First, blind deference by courts to a "presumption" of good faith is inappropriate in light of the previously cited instances of the Commission's disregard for express statutory safeguards. *See* pp. 22-24, *supra*. As this Court noted in *Mohasco Corp. v. Silver*, *supra*, 447 U.S. at 826, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." Second, to insure that its subpoena enforcement powers are not abused, a court should inquire into this presumption when there are non-frivolous, affirmative indications that the date may not be a good faith estimate.

In this latter regard, it is significant that the Department of Interior/Office of Equal Opportunity (acting as agent for the predecessor of the OFCCP) had conducted a desk audit and on-site compliance review of Shell's Wood River facility during the period from 1973 to 1975 and found the facility to be in compliance with Executive Order 11246.[27] Since E.O. 11246 contains not only a non-

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effective date of the Act in Commissioner's charges. *Id.* at 284. The district court, after a hearing, "accepted the statements of the EEOC that there was no *pro forma* insertion of the effective date of the act in this case," *id.*, and the Seventh Circuit determined that the district court decision was not clearly erroneous. The issue here, however, is whether the date included in a Commissioner's charge is a good faith estimate of the probable time periods of the alleged unlawful employment practices which is supported by some basis in fact. To the extent that the *Staley* decision can be read as allowing the inclusion of a date in a Commissioner's charge which has no basis in fact, it should be rejected as inconsistent with the oath and notice provisions of Section 706(b).

[27] 30 Fed. Reg. 12319 (1965), *as amended* by Exec. Order 11375, 32 Fed. Reg. 14303 (1967), and Exec. Order 11478, 34 Fed. Reg. 12985 (1969), *reprinted in* 42 U.S.C. § 2000e (1981) at 19, *et seq.*

discrimination requirement which is virtually identical to the one contained in Title VII, but also an "affirmative action" requirement, it is *highly* unlikely, if not impossible, that Shell could have been in compliance with E.O. 11246 during that time period if it had been engaging in the widespread discriminatory practices alleged in the instant charge. Shell referred the Commission (and the district court by way of exhibits) to the results of this compliance review. (J.A. 90). Moreover, the Commission has access to such information through a Memorandum of Understanding with the OFCCP, *see Emerson Electric Co. v. Schlesinger*, 609 F.2d 898 (8th Cir. 1979); the Commission is obligated by law to avoid unnecessary duplication of federal employment discrimination enforcement, *see* Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), and Executive Order 12067, 44 Fed. Reg. 1055 (1978); and such information therefore should have been reviewed prior to the issuance of the charge, *see* EEOC Compliance Manual (BNA) § 16.3 (c) and (e). In these circumstances, the use of a time period which encompassed 1973-75 affirmatively suggests a lack of a factual basis and, hence, a lack of the requisite good faith estimate of the date.

For the first time in this entire litigation, the Solicitor in his brief on the merits before this Court sought to provide some explanation why the amended date might constitute a "good faith estimate." (Pet. Br. 26-27). Such a belated attempt, however, falls far short of a proper meaningful "date." First, this "explanation" is not in the charge; is not on the record; and, accordingly, is at best hearsay. It was not sworn to by anyone, let alone the person who allegedly had knowledge enough to file the charge. Second, the "explanation" consists only of conclusory and result-oriented verbiage. It does not present any objective, verifiable information. A court called upon to enforce a subpoena would not be able to rely

upon this "explanation" to find that the date in fact reflected a "good faith estimate."

The Solicitor maintains that the "date" should not create any concerns regarding an open-ended investigation, since the administrative subpoena sought only information for the period from 1976 to 1980. This argument totally misses the point of the statutory requirement. The requirement exists to place the respondent on "notice"; to enable the respondent to preserve documents pursuant to the EEOC regulation requiring such;[28] and to enable a court, called upon to enforce a subpoena, to determine relevancy and materiality.[29]

As a practical matter, the Sixth Circuit noted in *K-Mart*, *supra*, 694 F.2d at 1064 n.8, that the inclusion of the effective date provides no real guidance on the temporal scope of the investigation to the EEOC district directors who normally prepare and issue the subpoenas. Without a more meaningful approximation of the probable dates, district directors would be left to make discretionary interpretations of the appropriate temporal scope of subpoenas. The Commission was not vested by Congress with such discretion, as it would be tantamount to the "almost unbridled discretion [of] executive and administrative officers, particularly those in the field"

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[28] *See*, p. 25, *supra*.

[29] Section 709(a) of Title VII, 42 U.S.C. § 2000e-8(a), entitles the Commission only to information that is relevant to the charge:

> In connection with any investigation of a charge filed under section [706] of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that *relates to* unlawful employment practices covered by this Subchapter and is *relevant to* the charge under investigation. (Emphasis added).

which this Court was so careful to curb in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978). Finally, notwithstanding any restriction on the time period involved in an initial request, such an open-ended date would not prevent the Commission from a subsequent request for information going back to July 2, 1965, nearly fifteen years prior to the date of the charge.[30]

D. A Statement Of Conclusory Allegations Of Discrimination Without Any Accompanying Factual Or Statistical Basis Does Not Set Forth Circumstances Which Are Meaningful And Verifiable For Purposes Of Oath And Notice.

As previously noted, statutory words are to be given their common meaning unless there is some contrary evidence of Congressional intent. There is no legislative history to define "circumstances." Dictionary definitions use words such as "attendant or accompanying facts" [31] or "a fact or event accompanying another." [32] Consistent with this common usage, the Eighth Circuit determined that "[a]s with the date requirement, we read this to require the statement of circumstances to be supported by some factual or statistical basis." 676 F.2d at 325-26. The decision of the Eighth Circuit merely implemented the clear statutory requirement that a charged party be informed in a reasonably specific manner of the circumstances of al-

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[30] The Solicitor has argued that if a Commissioner cannot use the effective date of the Act as the "date" in a Commissioner's charge "the worst offender under Title VII—the employer that had never acted to integrate its segregated workforce after the passage of Title VII—could not be accurately charged under the Act simply because of the extent of its discrimination." (Pet. Br. 31 n.25). In such an instance, however, the Commissioner should have no difficulty in setting forth in the charge a sufficient explanation for his or her use of the July 2, 1965 date.

[31] *Black's Law Dictionary*, Fifth Edition (West Publishing Co. 1979).

[32] *Webster's New World Dictionary* (Simon & Schuster 1980).

leged violations and not just the alleged violations themselves. The Eighth Circuit further reasoned that "[a] charge which simply alleges discrimination in all areas of employment practice without some factual or statistical basis . . . fails to give the employer sufficient notice." *Id.* at 326. Since the Commissioner's charge against Shell did not set forth any factual basis for its litany of discriminatory employment practices, the charge did not provide any meaningful or verifiable information to Shell or a court and failed to meet the oath and notice requirements of Section 706(b).

The Solicitor argues that the Eighth Circuit's opinion has created technical pleading requirements and that it would require the Commission to establish "probable cause" or "reasonable cause" in order to secure enforcement of a subpoena. (Pet. Br. 14, 21, 23, 32). The Court should look beyond such labeling. The Eighth Circuit merely recognized and applied the plain meaning of the word "circumstances." That word was chosen by Congress, not the Eighth Circuit. It was not superfluous verbiage but, instead, has an important role in this congressional scheme. By requiring that the "circumstances" of the alleged unlawful employment practices be disclosed to the charged party, Congress sought to ensure that the Commission would not initiate investigations unless it first possessed facts upon which it could make sworn allegations of discrimination. The facts were to be made known to the employer and any reviewing court in order to prevent a Commissioner from issuing unauthorized charges and to delineate the relevant and material scope of the investigation, including subpoenas issued in furtherance of the investigation. If the Commission were not required to state the factual basis for its charge, there would be no objective verifiable method for determining whether it had authority to investigate. Indeed, the express statutory requirements of oath and notice would be rendered meaningless.

The Solicitor also relies upon *K-Mart* and *Dean Witter* to support his characterizations. Besides misinterpreting the statutory requirements, each court's opinion must be placed in its own context. The Sixth Circuit in *K-Mart* was faced with the issues of oath and date, and the proper statutory construction of the word "circumstances" was neither briefed nor argued before the court. Its rejection in a footnote of the Eighth Circuit's holding that "some basis in fact" is required (694 F.2d at 1063 n.7) is clearly dictum. To whatever extent the court may have considered the "circumstances" requirement, it erred in equating "some basis in fact" with "probable" or "reasonable cause."

In *Dean Witter*, the Ninth Circuit assumed that the Commissioner's charge was based upon a charge by an aggrieved individual who wished to remain anonymous. In this context the court feared that additional circumstances might disclose the identity of the individual on whose behalf a charge was brought:

> [A] rule requiring the EEOC to disclose the information that is the basis for a Commissioner's charge would tend to defeat *the purpose* behind the Commissioner's charge, which is to enable aggrieved persons to have charges processed under circumstances where they are unwilling to come forward publicly for fear of economic or physical reprisals. (Citations omitted) (emphasis added), 643 F.2d at 1339.

The Commission has conceded that there is no underlying aggrieved individual in Shell's case. Rather, the charge was prompted by the staff of the EEOC in its Office of Systemic Programs. Therefore, *Dean Witter* is not analogous to the instant case.

The Seventh Circuit in *EEOC v. A.E. Staley Manufacturing Co.*, *supra*, 32 FEP Cases at 283-84, also has interpreted the Eighth Circuit's *Shell* decision erroneously as requiring the Commission to demonstrate reasonable or probable cause in order to have its subpoena

enforced. As shown above, however, the Eighth Circuit did not impose a probable or reasonable cause standard, but merely required some "factual basis for the Commissioner's belief that a Title VII violation has occurred." 676 F.2d at 326.

These courts failed to recognize the critical link between the oath and circumstances provisions of 706(b). Instead, they have adopted the Commission's argument that no factual basis for a charge is necessary since the Commissioner must swear to a belief under oath. The fallacy of this "good faith" argument is that it renders the oath protection meaningless. Without revealing some factual basis, a Commissioner can allege mere beliefs without incurring the accountability intended by the oath requirement of Section 706(b). As the Eighth Circuit stated:

> We do not doubt that the Chair of the Commission may have some basis for her statement that she believes the employer has violated Sections 703 and 707 of the Civil Rights Act of 1964. However, we believe the law requires additional factual material to comply with section 706(b) and 29 C.F.R. § 1602.14(a) (1981). 676 F.2d at 326.

The Solicitor also cites a number of other cases to support his contention that the "circumstances" requirement of Section 706(b) does not require some factual basis in support of alleged violations. *See New Orleans Public Service, Inc. v. Brown*, 507 F.2d 160 (5th Cir. 1975); *Mountain States Telephone & Telegraph Co. v. EEOC*, 466 F.2d 541 (10th Cir. 1972); *Adolph Coors Co. v. EEOC*, 464 F.2d 1270 (10th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *Sparton Southwest, Inc. v. EEOC*, 461 F.2d 1055 (10th Cir. 1972) (*en banc*); *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783 (7th Cir. 1971); *Local 104, Sheet Metal Workers v. EEOC*, 439 F.2d 237 (9th Cir. 1971); *Bowaters Southern Paper Corp. v. EEOC*, 428 F.2d 799 (6th Cir.), *cert. denied*,

400 U.S. 942 (1970). *Each* of these cases, however, involved charges issued prior to the 1972 Amendments to Title VII. Since the charge-filing requirements were substantially altered in 1972 to require that a Commissioner's charge be under "oath or affirmation" and include the "date, place and circumstances" of alleged violations, these pre-amendment cases simply are not instructive.[33]

The Solicitor has failed to provide any evidence that Congress intended that the plain meaning of "circumstances" be ignored. After reflection upon the overall purpose of Section 706(b), it is clear that the Eighth Circuit's requirement that "some factual basis" for the charge must be provided is necessary to ensure that the safeguards created by Congress are effectively maintained.

II. THE COMMISSION'S LIMITED AUTHORITY TO COMMENCE AN INVESTIGATION OR TO HAVE A SUBPOENA ENFORCED ONLY AFTER A VALID CHARGE IS FILED SHOULD NOT BE CONFUSED WITH OTHER AGENCIES' BROADER AUTHORITY.

As noted above, unlike other federal agencies, the EEOC is without authority to commence an investigation in the absence of a valid charge of discrimination. By equating the authority of the EEOC with that of other federal agencies which have been given broad discretion to initiate investigations, the Solicitor has failed to acknowledge this fundamental limitation on the EEOC's

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[33] In addition, two of the Solicitor's cases expressly equate the authority of the EEOC with that of the FTC. *See Local 104, supra*, 439 F.2d at 242; *Bowaters, supra*, 428 F.2d at 800. As already noted, Congress specifically observed that the EEOC's investigatory authority was not equivalent to the FTC's. *See* pp. 10-11, *supra*. In one other decision, *New Orleans Public Service*, the case involved six individual charges as well as a Commissioner's charge. 507 F.2d at 162. Thus, none of the pre-amendment cases cited by the Solicitor even addresses the issue present in the instant case.

power. This failure is most evident in the Solicitor's reliance on this Court's decision in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) ("*Socal*"). By arguing that *Socal* prohibits a court from reviewing the legal sufficiency of a Commissioner's charge, the Solicitor has ignored the fact that a court that is asked to enforce an EEOC subpoena *must* first determine that there is a valid charge, since in the absence of such a valid charge the Commission is without authority to issue or have enforced a subpoena. Finally, the Solicitor has overstated vastly the potential effect of this case on other federal agencies.

A. The EEOC's Investigative Authority, As Limited By Section 706(b), Cannot Properly Be Equated With That Of Other Civil Rights Enforcement Agencies.

The limited, charge-based investigative authority of the EEOC is in contrast to the essentially self-initiating authority of many other federal agencies. The manner by which the Commission may exercise its investigative authority is quite different from the authority of the two other federal agencies with primary responsibility for enforcing equal employment opportunity laws and regulations, the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor and the Department of Justice.

In carrying out its responsibilities under Executive Order 11246, the OFCCP need not have received any allegation of a violation of the Executive Order but can commence an investigation on its own initiative in order to determine if a government contractor is complying with the Executive Order. *See* Executive Order 11246, §§ 206 (a), 208, 209, *reprinted in* 42 U.S.C. § 2000e (1981) at 21-22.

The Department of Justice has authority under Title VII to file "pattern or practice" suits against state and

local governments "[w]henever the Attorney General has *reasonable cause to believe* that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." Section 707(a), 42 U.S.C. § 2000e-6(a) (emphasis added). Thus, the Department of Justice has self-starting "pattern or practice" authority in the public sector. Unlike EEOC, the authority of the Department of Justice is not dependent on a valid charge of discrimination, nor is the Department of Justice expressly required to adhere to the other administrative prerequisites set out in Section 706 of Title VII.

By contrast, EEOC's authority is limited. Pursuant to the 1972 Amendments to Title VII, Section 707(e), 42 U.S.C. § 2000e-6(e), authorizes EEOC "to investigate and act on a *charge* of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." (Emphasis added). Further, Section 707(e) expressly provides that "[a]ll such actions shall be conducted in accordance with the procedures set forth in section [706] of this title." Thus, despite the Commission's preference for independent pattern or practice authority, see Testimony of William H. Brown, III, Chairman of EEOC, Legislative History of the Equal Employment Opportunity Act of 1972 at 932 (1972), Congress in 1972 expressly declined to grant such authority and restricted the Commission to investigating and acting upon valid charges of discrimination.[34]

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[34] The Senate clearly recognized the distinctions between the audit function of the OFCCP and the EEOC's function of investigating specific complaints. Legislative History of the Equal Employment Opportunity Act of 1972 at 915. Senator Williams argued that the transfer of OFCCP audit authority to EEOC was required to coordinate their respective activities. *Id.* at 919. Senator Saxbe proposed an amendment to delete from the Senate bill a provision to transfer the OFCCP audit functions to the EEOC and instead create the Equal Employment Opportunity Coordinating Council.

In addition, as noted *supra*, pp. 10-11 and n.12, the legislative history of the 1964 Act clearly distinguishes the authority of EEOC from the broader investigatory powers of other agencies such as the FTC and the Wage and Hour Administrator of the Department of Labor.[35]

B. *Socal* Does Not Prohibit A Court In An EEOC Subpoena Enforcement Action From Reviewing The Validity Of A Commissioner's Charge, Since Unlike The FTC, The EEOC's Investigatory Authority Is Contingent Upon The Filing Of A Valid Charge Under Section 706(b).

The Solicitor argues that this Court's decision in *Socal* mandates that the Commissioner's charge at issue herein is "not subject to routine judicial oversight, precisely because it is merely a preliminary step that signals the commencement of an agency investigation." (Pet. Br. 44). The Solicitor's attempt to apply the principles of *Socal* to the instant case, however, is unavailing. As set forth above, the commencement of an EEOC investigation is not committed to agency discretion, but rather may proceed only on the basis of a valid charge of discrimination.

Socal involved a challenge to the issuance of a complaint by the FTC pursuant to Section 5(b) of the Fed-

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Id. at 937. This amendment was passed and enacted into law. In 1978 the Council was abolished and its coordinating function was transferred to the EEOC. *See* Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), 92 Stat. 3782, and Executive Order 12067, 44 Fed. Reg. 1055 (1978). *See* also 42 U.S.C. § 2000e-14.

[35] The Solicitor has cited *Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S. 186, for the proposition that "federal courts should not probe the 'factual basis' of Commission charges any more than they should second guess whether the FTC has properly issued an administrative complaint." (Pet. Br. 43). The legislative history of Title VII *expressly* cited *Oklahoma Press Publishing Co.* as an indication of the investigatory authority which the EEOC would *not* have. *See* p. 11, *supra*.

eral Trade Commission Act, 15 U.S.C. § 45(b). Section 5(b) authorizes the FTC to issue a complaint where it has "reason to believe" that a company is engaged in acts prohibited by the statute, and where "it shall appear to the [FTC]" that a proceeding by it would be in the interest of the public. Thus, Section 5(b) commits the commencement of an administrative action to the discretion of that agency. Under the circumstances in *Socal*, this Court held that the issuance of the complaint was not subject to judicial review before completion of the administrative process. It is clear, however, that Congress did not intend for EEOC to possess such self-starting investigative power. *See* discussion at pp. 10-12 and 34-36, *supra*. Rather, Congress intended that the authority of the Commission would commence *only* with the filing of a valid charge of discrimination meeting the requirements of Section 706 (b). Thus, the requirements of Section 706(b) are not "threshold determinations" as in *Socal* but, instead, are conditions precedent which must be met in order to satisfy the express requirements of the statute. Since this case involves the "purely legal question of jurisdiction," the policies underlying this Court's decision in *Socal* simply do not apply. *United States v. Cabrini Medical Center*, 639 F.2d 908, 910 (2d Cir. 1981). It is clear that a court which is asked to enforce a Commission subpoena *must* determine that the subpoena is based on a valid charge in order to avoid abusing its discretion. *United States v. Powell*, 379 U.S. 48, 58 (1964); *EEOC v. K-Mart Corp.*, *supra*, 694 F.2d at 1061; *EEOC v. Dean Witter Co., Inc.*, *supra*, 643 F.2d at 1337-38; *Graniteville Co. v. EEOC*, *supra*, 438 F.2d at 35; *EEOC v. Union Bank*, *supra*, 408 F.2d at 870. Thus, once the Commission commenced the subpoena enforcement action herein, the district court was *required* to determine the validity of the charge before it could decide the Commissioner's subpoena enforcement application. The limitations of judicial re-

view set forth in *Socal* would be in direct conflict with this judicial duty. Therefore, the *Socal* holding cannot apply to this case.[36]

C. The Solicitor Has Overstated The Effect Of A Decision In This Case On The Commission And Other Agencies.

The Solicitor's intimation (Pet. Br. 44-46) that the decision in this case could affect the functioning of a large number of federal agencies which are authorized to act upon a determination of "reasonable cause" or "reason to believe" a violation exists again reflects his failure to distinguish the authority of the Commission from that of other federal agencies. The Commission is *not* authorized to act upon a "reasonable cause" or "reason to believe" standard, but rather upon adherence to the charge-filing requirements of Section 706(b). The requirements of Section 706(b) are the *only* requirements at issue and a

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[36] Assuming *arguendo* that the decision in *Socal* is relevant and material to the issues in the instant case, the Solicitor's analysis is incorrect. The Solicitor must first apply the principles underlying the ripeness, finality and exhaustion of remedies doctrines to the facts in this case instead of summarily applying the *Socal* result. There are four fundamental factual differences. First, the FTC and EEOC differ in authority granted by Congress. Second, the standards for an FTC complaint and Section 706(b) requirements for a valid charge are different. Third, Socal asked the Court to speculate whether the FTC had reasonable cause. Shell, on the other hand, requests the court to enforce the provisions of Section 706(b) and require a charge to contain sufficient information, susceptible of verification, to enable the statutory oath and notice requirements to be meaningful. Fourth, unlike Socal, Shell has raised these issues in judicial subpoena enforcement proceedings. Thus, internal agency procedures were exhausted and the matter was taken to federal court. The issue of whether the EEOC had statutory authority to request subpoena enforcement in the absence of a valid charge is certainly ripe. If the courts enforce a subpoena issued by the EEOC without authority, irreparable injury would occur. Thus, the elements of finality are also present in this case.

decision in this case should not affect the other agencies listed by the Solicitor.

This Court rejected similar arguments by the Solicitor in *Marshall v. Barlow's, Inc.*, *supra*, 436 U.S. at 321-22, when it stated that "[i]n short, we base today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes." As in *Barlow's*, it is submitted that this Court should limit its consideration to the requirements of Section 706(b) and should not be swayed by the Solicitor's arguments regarding "different administrative schemes."

III. GUIDANCE BY THIS COURT IS ESSENTIAL TO PREVENT FUTURE LITIGATION OVER THE AMOUNT OF DETAIL PROVIDED IN A COMMISSIONER'S CHARGE.

For the reasons discussed in this brief, this Court should affirm the decision below that Section 706(b) requires a charge to disclose a meaningful statement of the date, place, and circumstances of the alleged unlawful practices to enable the respondent to preserve documents and to enable a court called upon to enforce a subpoena to determine relevancy and materiality. This is especially essential in a statistically-based Commissioner's charge of a pattern or practice violation.

The actions of the Commission and the Solicitor in this case vividly illustrate the need for added clarification of the decision below to avoid unnecessary continued litigation arising out of the Commission's misinterpretation of the Eighth Circuit's holding. First, after the Eighth Circuit's original decision, the Commission's petition for rehearing attempted to "clarify" any uncertainty about the "circumstances" by indicating that the charge was based on the criteria for targeting subjects for "systemic inquiry" under its Office of Systemic Programs. *See* Pet. App. 40a-43a. Such a general "clarification", however, merely

demonstrated the Commission's continued unwillingness to disclose any meaningful information, because it did not specify which criterion (or criteria) had been used and how it (they) had caused the Commissioner to believe the alleged violations might exist. Second, in his Reply Brief to Shell's Response to the Petition for Certiorari, the Solicitor introduced statistical "data" which he implies constituted "the basis for the commissioner's charge in this case." (Pet. Reply Br. at 3 n.3). The Solicitor's "data", however, were not in the charge, were not sworn to, and are not properly a part of the record in this case. Accordingly, there is no way of knowing whether these data were, in fact, ever considered by the Commissioner who issued the charge. Moreover, the Commission continues to deny that it has any obligation to provide this, or any other specific data, in support of such a charge.[37]

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[37] The Solicitor attempts to justify his improper introduction of statistics at this stage on the ground that this was necessary in order to respond to statistics Shell had introduced in the district court. The Solicitor also accuses Shell of attempting to engage in a "mini-trial" of the merits at the subpoena enforcement stage. (Pet. Br. at 37 n.30). These contentions are without merit. Shell introduced its statistics in the district court solely to show that its request for discovery of the factual basis for the Commissioner's charge was not frivolous or in bad faith. *See* pp. 26-27, *supra*. It is the Solicitor, not Shell, who has attempted to use statistics to argue the merits of the charge.

Under the circumstances, Shell feels compelled to respond to the Solicitor's misleading statistical data. The statistics presented by the Solicitor improperly used data based on the St. Louis Standard Metropolitan Statistical Area (SMSA) for 1978 as a means for judging Shell's compliance with the Act. The federal government previously had recognized and agreed that since the refinery was located at the far edge of the St. Louis SMSA, the appropriate labor market area for locally-recruited employees is not the entire SMSA; rather, it consists of three of the eight counties in the SMSA plus the City of St. Louis and three other counties which lie outside of the SMSA. (J.A. 90). In addition, Shell's representation in EEO-1 Job Categories is compared for each year from 1970-78 with the 1978 SMSA availability. Such a comparison failed to take into account that Shell's 1970 representation properly should be

Third, as discussed at pp. 27-28, *supra*, the Solicitor has attempted in his Brief on the Merits to this Court to explain why the Commissioner considered July 2, 1965, to be a good faith estimate of the required date. Again, there is no way of knowing whether this extra-record explanation reflects the Commissioner's thinking, as it was not in the charge or under oath. In any event, this explanation was not meaningful because it was totally subjective and consisted only of conclusory statements.

Clearly, some guidance from this Court is needed to enable the parties and the lower courts to understand fully how the requirements of Section 706(b) are to be applied in cases involving statistically-based Commissioner's pattern or practices charges of discrimination.[38]

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compared to 1970 availability, which could be significantly different from the 1978 availability. The comparison set forth also fails to take into account the numbers of persons who were either hired prior to the effective date of the Act or before the relevant time period for liability. *See Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977); *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. at 341; *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Movement for Opportunity v. General Motors*, 622 F.2d 1235, 1245 (7th Cir. 1980). The Solicitor's own comparison, even though based on an inappropriate relevant labor market, indicates that Shell's representation in certain EEO-1 Job Categories exceeded availability in the SMSA. *Compare, e.g.*, 5.3% representation of blacks among Shell's "professional" employees to the Solicitor's alleged 4.5% availability for black professionals in the SMSA.

[38] Should the Court undertake to render such guidance, Shell respectfully submits for the Court's consideration the following elements:

(a) the source(s) of the statistics relied upon by the Commissioner,

(b) the date(s) of the statistics,

(c) identification of the labor market used to determine the availability data and the source(s) of that data, and

The more information an employer is given regarding the "date, place and circumstances" in the charge, the earlier the employer will be able to produce relevant materials and the greater the potential for meaningful discussion of those materials. As the Eighth Circuit noted, by providing some factual basis for the charge, the Commission will enable the parties to determine whether conciliation would be appropriate. 676 F.2d at 326. The Solicitor contends that such notice was not intended to enable the parties to determine whether conciliation might be appropriate because "conciliation" of charges occurs after the Commission has completed its investigation and issued a finding of "reasonable cause." (Pet. Br. 34 n.27). As this Court noted in *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595 n.5 (1981), however, "[i]n most cases, the Commission actually begins its attempt to achieve a negotiated settlement *before* it makes a reasonable-cause determination. 20 C.F.R. § 1601.20 (1979); EEOC Compliance Manual § 15." (Emphasis added).[39] Accordingly, it is clear that the statutory notice requirement enforced by the Eighth Circuit is consistent with the policy of Title VII to achieve prompt, voluntary compliance with the Act, regardless of when the formal conciliation process begins. *See Ford Motor*

(d) identification of the job categories used for availability comparisons.

This type of information should be readily available to the Commission in all statistically-based Commissioner's pattern or practice charge cases and could be provided by the Commission without any interference and/or burden to its functions under Ttitle VII. *See* EEOC Compliance Manual (BNA), § 16.

[39] 29 C.F.R. § 1601.20 states as follows:

(a) *Prior to the issuance of a determination as to reasonable cause*, the Commission may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors and the . . . Director of Systemic Programs . . . shall have the authority to sign any settlement agreement which is agreeable to both parties. (Emphasis added).

Co. v. EEOC, 102 S.Ct. 3057, 3064 (1982); *United Steelworkers of America v. Weber*, 443 U.S. 193, 203-04 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); Legislative History of the Equal Employment Opportunity Act of 1972 at 227 (1972).

CONCLUSION

For the foregoing reasons, Shell respectfully submits that the decision of the Eighth Circuit herein should be affirmed.

Respectfully submitted,

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July 22, 1983

APPENDIX A

Parent Companies and Affiliated Companies
of
SHELL OIL COMPANY

Basin Pipe Line System
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Cortez Pipeline Corporation
Crown-Shell Baytown Feeder Line System
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
First Harlem Securities Corporation
Gravcap, Inc.
Heat Transfer Research Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
MESBIC Financial Corporation of Houston
George Newman & Company
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Olympic Pipe Line Company
Ozark Pipe Line Company
Plantation Pipe Line Company
Quazite Corporation
Rancho Pipe Line System
Royal Dutch Petroleum Company
Seadock, Inc.
Shell Petroleum, N.V.
The "Shell" Transport and Trading Company, Ltd.
Ship Shoal Pipe Line System
Thums Long Beach Company
United Scientific, Inc.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyoming Industrial Development Corporation

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
WASHINGTON, D.C. 20506

072800036

COMMISSIONER'S CHARGE

Pursuant to the provisions of Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq, (Supp v. 1975) I charge the following employer with unlawful employment practices:

Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois 62095

I believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment.

More specifically, the employer's unlawful discriminatory practices include, but are not limited to:

1. Failing or refusing to recruit, hire, promote, train, assign or select Blacks for managerial, professional, technical, office/clerical, craft, and service workers positions because of their race.

2. Failing or refusing to recruit, hire, promote, train, select, and assign females to managerial, professional, technical, craft, operative, laborer and service worker positions because of their sex.

The persons aggrieved include all Blacks and women who are, have been or might be affected by the unlawful employment practices complained of herein.

District of Columbia, ss:

I, ELEANOR HOLMES NORTON, being duly sworn, depose and say that I am a Commissioner of the Equal Employment Opportunity Commission and that I have cause to believe that Shell Oil Company has committed the unlawful employment practices set forth in the foregoing charge.

/s/ _____
ELEANOR H. NORTON

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27th DAY OF SEPTEMBER 1979.

/s/ _____
CORA O. DIXON
Notary Public

My Commission expires September 14, 1981.

APPENDIX C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WASHINGTON, D.C. 20506

AMENDMENT TO COMMISSIONER CHARGE

On September 27, 1979, I signed a Commissioner charge against:

Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois

When I signed the charge I intended to cover all the unlawful employment practices identified therein occurring from July 2, 1965, continuing through at least the date of the charge, and I believe that the charge as written did cover that time period. Nevertheless, to clarify any possible ambiguity that may exist in view of the decision in *EEOC v. Dean Witter Co.*, 621 F.2d 1012 [sic] (9th Cir. 1980), I hereby amend the original charge, which is incorporated here by reference, to state that I have reason to believe that the named employer had engaged in the identified unlawful employment practices on a continuing basis from at least July 2, 1965, until the present.

I swear or affirm that I have read the above amendment and that it is true to the best of my knowledge, information and belief.

/s/ _____
ELEANOR H. NORTON
Commissioner

Subcribed and sworn to before me this 16th day of January, 1981.